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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 76-1732

KALVAR CORPORATION, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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OCTOBER TERM 1976

No. 76-

KALVAR CORPORATION, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Kalvar Corporation respectfully petitions the Court to grant a writ of certiorari to review the judgment and opinion of the United States Court of Claims entered in this proceeding on October 20, 1976.

OPINION BELOW

The opinion of the Court of Claims, available in slip opinion form and unofficially reported at 543 F.2d 1298, appears at Appendix A. It is not yet officially reported. The unreported order of the Court of Claims denying petitioner's motion for rehearing appears at Appendix B.

A related decision of the Comptroller General of the United States in *Matter of Kalvar Corporation* (B-177719, March 29, 1974) is reported at 53 Comp. Gen. 720. The Comptroller General's decision on re-

consideration in the same case (October 23, 1974) is unreported. The two decisions appear at Appendix C and Appendix D, respectively.

JURISDICTION

The date as well as time of entry of the judgment and opinion sought to be reviewed is October 20, 1976. The date of the order by the Court of Claims denying petitioner's motion for rehearing is January 7, 1977. On April 1, 1977, Chief Justice Warren E. Burger issued the order of this Court extending petitioner's time for filing a petition for writ of certiorari to and including June 6, 1977.

Petitioner invokes the jurisdiction of the Court under Title 28, United States Code, Sections 1255 and 2101(c).

QUESTIONS PRESENTED

1. Did the Court below err when it ruled as a matter of law that petitioner could not recover breach of contract damages in the absence of Governmental bad faith or clear abuse of discretion?

2. Aside from the above question, did the Court below act arbitrarily and capriciously when it granted the Government's motion for summary judgment on the basis that petitioner had not made "a sufficient showing of Governmental bad faith or abuse of discretion to raise a triable issue"?[1]

3. Did the Court below unreasonably discount petitioner's breach of contract claim on the basis of cost

[1] Opinion of the Court below, Appendix A, at p. 3a.

principles applicable to termination for the Government's convenience?

STATUTES AND REGULATIONS

Title 28, United States Code, Section 1491

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of any executive department, or upon any express or implied contract with the United States. . . ." Full text of 28 U.S.C. § 1491 at Appendix E.

Title 40, United States Code, Section 481(a)

"The Administrator [i.e. Administrator of General Services] shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned–

"(1) prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting; and . . .

"(2) . . .

"(3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply such as those men-

tioned above in subparagraph (1) of this subsection: . . . " Full text of 40 U.S.C. § 481(a) at Appendix F.

Title 40, United States Code, Section 486(c)

"The Administrator [i.e. Administrator of General Services] shall prescribe such regulations as he deems necessary to effectuate his functions under this Act, and the head of each executive agency shall cause to be issued such orders and directives as such head deems necessary to carry out such regulations."

Federal Property Management Regulations
Code of Federal Regulations, Title 41, Chapter 101

41 CFR Part 101-26—Procurement Sources and Programs; Subpart 101-26.1—General:

41 CFR 101-26.100-1, "Procurement of lowest cost item"
41 CFR 101-26.100-2, "Request for waiver"

41 CFR Subpart 101-26.4—Purchase of Items from Federal Supply Schedule Contracts:

41 CFR 101-26.401, "Applicability"
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41 CFR Part 101-29—Federal Specifications and Standards; Subpart 101-29.2—Specifications:

41 CFR 101-29.203, "Mandatory use of Federal Specifications"
41 CFR 101-29.204, "Exceptions to mandatory use of Federal Specifications"
41 CFR 101-29.205, "Deviations from Federal Specifications"

These Federal Property Management Regulations, issued by the Administrator of General Services under his authority at 40 U.S.C. § 481(a) and § 486(c), appear in full text at Appendix G.

Federal Procurement Regulations
Code of Federal Regulations, Title 41, Chapter 1

41 CFR Part 1-1—General; Subpart 1-1.3—General Policies; Section 1-1.305—Specifications:

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41 CFR Part 1-8—Termination of Contracts; Subpart 1-8.2—General Principles Applicable to the Termination for Convenience and Settlement of Fixed-Price Type and Cost-Reimbursement Type Contracts:

41 CFR 1-8.202, "Notice of termination"

Subpart 1-8.3—Additional Principles Applicable to the Settlement of Fixed Price Type Contracts Terminated for Convenience

§ 1-8.301, "General"

These Federal Procurement Regulations, issued by the Administrator of General Services under his authority at 40 U.S.C. § 481(a) and § 486(c), appear in full text at Appendix H.

STATEMENT OF THE CASE

Petitioner filed suit in the United States Court of Claims for damages on account of the Government's alleged breach of a standard primary source of supply contract within the Government-wide program of Federal Supply Schedule contracting.[2] The contract, which Federal Supply Service, General Services Administration, awarded to petitioner following advertised bid competition, called for Government agencies, pursuant to the contract's Schedule and "Scope of Contract" provision,[3] to purchase during fiscal year 1973 their normal requirements of thermal developing film in stated sizes from petitioner and for petitioner to deliver such film at its bid prices to the purchasing agencies. Under the terms of the Schedule, the film bought and sold was required to conform to the applicable Federal Specification for thermal developing film, namely, Federal Specification L-F-320b (May 4, 1965), "Film, Thermal Developing", as modified by Amendment No. 1 to the Solicitation. Also, under the "Special Requirements" provision of the contract,[4] if an agency finds that the thermal developing film contracted for will not meet a special requirement which

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[2] The nature of a primary source of supply contract, including the requirement for Government agencies to use same, is described in the Federal Property Management Regulations at Subpart 101-26.4—"Purchase of Items from Federal Supply Schedule Contracts." Applicable citations in the Code of Federal Regulations are 41 CFR 101-26.401 through 101-26.401-4, included in Appendix G at p. 36a and p. 40a.

[3] Pertinent part of "Scope of Contract" provision appears at Appendix I, p. 48a.

[4] The "Special Requirements" provision appears at Appendix J, p. 49a.

it might have for such film, the agency is permitted to purchase the film elsewhere provided it first obtains from Federal Supply Service a waiver of its obligation to use the primary source of supply contract.

Between three and four months after petitioner's primary source of supply contract was in effect, Internal Revenue Service (IRS) informed Federal Supply Service that it had a requirement for thermal developing film with a faster speed than the film being supplied at the time by petitioner. IRS wanted film which could run on its duplicating equipment at the rate of 200′ per minute. At the same time, IRS requested Federal Supply Service to make availble two brand name films to satisfy its film speed requirement, one of such films being manufactured by petitioner and the other by a second film supplier.

Federal Supply Service thereupon took steps looking toward the negotiation of multiple award Federal Supply Schedule contracts with the two film suppliers without regard to the fact that petitioner could have satisfied IRS's film speed requiremnt with film under its primary source of supply contract, that is, film at the contract prices and in conformity to the controlling Federal Specification. The Federal Specification provided for film within a broad range of sensitometric characteristics, including film with speeds capable of meeting the particular IRS requirement. The result of Federal Supply Service's accommodation to IRS was the setting up, on November 27, 1972, of a new source supply of thermal developing film for the entire Government, namely, a negotiated Federal Supply Schedule contract awarded to the second supplier. Petioner had withdrawn its offer of a similar contract

covering its brand name film out of concern over aiding and abetting the undercutting of its primary source of supply contract.

In nullifying the primary character of its primary source of supply contract with petitioner, Federal Supply Service deliberately withheld from petitioner timely information about IRS's special film speed requirement and in doing so, Federal Supply Service ignored responding to petitioner's written inquiry asking what agency had a requirement for thermal developing film which could not be met by film within the terms of the primary source of supply contract and what was the nature of the requirement.

When it made a negotiated contract award to the second contractor, Federal Supply Service did so on the basis that the speed of the second contractor's film was outside the speed range prescribed in the Federal Specification and therefore outside the scope of petitioner's primary source of supply contract. Federal Supply Service reached this conclusion with no capacity of its own to make the required sensitometric measurements (that is, measurements explicitly prescribed in the controlling Federal specification). It made its determination solely upon reliance of the self-serving assertions of the second contractor, which itself had no capacity to make the required sensitometric measurements. Moreover, when Federal Supply Service was put on notice shortly after the contract award to the second contractor that proper sensitometric measurements indicated a conclusion contrary to its own, Federal Supply Service did nothing to resolve the difference in objective terms; rather, it simply persisted in its own subjective determination.

Although Federal regulations mandated that priority be given in Federal procurement to supplies conforming to Federal specifications as compared with non-spec supplies,[5] Federal Supply Service reversed the prescribed priority by favoring what it supposed to be non-spec film over film conforming to the controlling Federal Specification.

Federal Supply Service also transgressed the "Special Requirements" provision of petitioner's primary source of supply contract, particularly the waiver procedure therein,[6] when it awarded to the favored second contractor an open-ended Federal Supply Schedule contract, enabling the second contractor to sell to the entire Government market (not just to IRS) thermal developing film in dimensions of petitioner's contract film—regardless of whether there was any need for the speed of the second contractor's film. The resulting contract situation was worsened for petitioner by the facts that the second contractor, which had unsuccessfully competed in the earlier advertised bid competition, sold it film at prices below petitioner's winning bid prices, that under Federal regulation Government agencies were required to buy the lowest

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[5] Federal Property Management Regulations at 41 CFR 101-29.203 to 101-29.205 spell out the obligation of Government agencies to use Federal Specification supplies. These regulations are included in Appendix G at pp. 40a-42a. Similar Federal Procurement Regulations at 41 CFR 1-1.305 to 1-1.305-3 are included in Appendix H at pp. 43a-46a.

[6] Federal Property Management Regulations pertinent to the "Special Requirements" provision and the waiver procedure therein are 41 CFR 101-26.100-2 and 41 CFR 101-26.401-3, beginning at pp. 35a and 38a, respectively, Appendix G.

priced supplies suitable to their needs,[7] and that Government agencies could readily accommodate to film faster than their regular film even though they had no need for any extra speed. In the parlance of procurement, the favored second contractor was given "two bites at the apple."

At the hearing before the Court below on cross motions for summary judgment, the Government introduced a brand new argument, namely, that even conceding *arguendo* a breach of contract by the Government, petitioner was not entitled to recover breach of contract damages in the absence of the Government's "bad faith" or "clear abuse of discretion." Theretofore, the single issue in the briefs of both parties was whether the Government had breached its contract with petitioner. At the hearing, the Government argued for the first time that since petitioner had not alleged bad faith or clear abuse of discretion petitioner's recovery is limited to such costs as are allowable under the contract's standard termination for convenience clause. In view of the Government's new position, which had not been suggested in any prior pleading or brief, petitioner moved for leave to file a post-hearing brief, and the Court allowed each party to file a supplemental statement and brief.

In its ensuing supplemental statement and brief, petitioner emphasized that during the course of the Government's breaching of its primary source of supply contract with petitioner the Government's bad faith

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[7] The Federal Property Management Regulation entitled "Procurement of lowest cost item" and cited as 41 CFR 101-26.100-1 is included in Appendix G at p. 35a.

and abuse of discretion were manifested in the following ways, among others:

1. Violation of a series of Federal Property Management Regulations and Federal Procurement Regulations.

2. Willful indifference to the requirements of the applicable Federal Specification and to the validity and veracity of technical findings in connection therewith.

3. Pattern of uneven, discriminatory conduct in the administration of primary source of supply contracts during fiscal years 1972 and 1973 wherein one of petitioner's competitors was wrongfully favored over petitioner.

4. Deliberate withholding of information from petitioner about IRS's requirement for film with a particular speed capability in face of the "Scope of Contract" provision of the primary source of supply contract.

5. Absence of fidelity to, and actual circumvention of, the "Special Requirements" provision of the primary source of supply contract in that the waiver procedure therein was needlessly replaced by the arbitrary establishment of a new source of thermal developing film supply for all Government agencies.

Following its consideration of the supplemental statement and brief by each of the parties, the Court below denied petitioner's motion for summary judgment on the issue of liability and except for remand of an unresolved question about the amount of a minor

cost item which was deemed allowable, the Court below granted the Government's motion for summary judgment. In doing so, the Court below did not consider the merits of petitioner's claim of breach of contract, including Federal Supply Service's violation of a series of the Government's own regulations; instead, the Court below simply concluded that petitioner's case for Governmental bad faith or abuse of discretion—a necessary condition in that Court's opinion for the petitioner to recover breach of contract damages—did not raise a triable issue.

Petitioner's motion for rehearing pointed out the Federal Supply Service's violations of seven separate Federal regulations, as well as one Federal specification, and developed the following three points:

> 1. The Court of Claims erred in holding that a showing of "bad faith" or "clear abuse of discretion" on the Government's part is requisite to the petitioner's case for breach of contract damages; and
>
> 2. Within its own terms for converting a breach of contract into a termination for the Government's convenience, the Court of Claims did not fairly appraise plaintiff's claims of the Government's "bad faith" and "clear abuse of discretion".
>
> 3. The Court below unfairly applied the cost principles for termination for convenience to the Government's breach of contract.

The Court below summarily denied petitioner's motion for rehearing and at the same time, summarily

denied plaintiff's motion for leave to amend its petition, which petitioner had filed in order to conform its petition to developments in its case. Petitioner's amended petition included explicit allegations of the Government's bad faith and clear abuse of discretion, separately identified Federal Supply Service's violations of Federal Property Management Regulations and Federal Procurement Regulations, and detailed the dollar components of its breach of contract claim.

In denying petitioner's claim for breach of contract damages and limiting petitioner's recovery to what was considered to be allowable under the standard termination for convenience clause, the Court below rejected the following categories of claims by petitioner which comprised petitioner's total claim of $146,308:

First Category ($13,555). Difference between film prices under petitioner's primary source of supply contract as originally agreed to by Federal Supply Service and lower prices for which petitioner later sold its film to Government agencies in order to meet the price competition of the second supplier.

Second Category ($14,925). Legal fees and expenses incurred in trying to settle differences with Federal Supply Service at the administrative level over its breach of petitioner's primary source of supply contract.

Third Category ($3,250). Additional administrative, quality control and testing expenses associated with the Federal Supply Service's breach of contract.

Fourth Category ($17,250). Cost of financing investment in raw materials, work-in-process, and

finished goods inventories in anticipation of and preparation for meeting that part of the Government's regular film requirements which, as a matter of fact, were taken care of by the second supplier instead of petitioner.

Fifth Category ($35,738). Loss on account of petitioner's higher administrative burden on reduced film sales to the Government, reflecting film purchases by the Government from the second supplier instead of petitioner.

Sixth Category ($61,590). Loss of profits on film not sold to the Government because of its purchase of film from the second supplier.

The Court below would limit petitioner's recovery to petitioner's expenses for preparing and filing its post hearing supplemental statement and brief pursuant to the Court's own order. The exact amount of this relatively minor expense has not yet been settled upon.

REASONS FOR GRANTING WRIT OF CERTIORARI

Just relations between the Federal Government and its private suppliers underlie the reasons for the Court to exercise its judicial discretion in favor of granting the writ. Basically, the Court ought to correct the unfair and unwarranted precedent set by the Court below which permits the Federal Government to abuse its private suppliers by frustrating their right of redress for breach of contract.

The excessive Government bias complained of by petitioner was notably manifest when the Court below created a wholly irrelevant prerequisite for awarding

breach of contract damages, when the Court below badly misconstrued its own prerequisite of Governmental "bad faith" or "clear abuse of discretion", and when it totally disregarded Federal Supply Service's violations of the Government's own regulations. Further, petitioner received unfair treatment from the Court below when that Court converted Federal Supply Service's egregious breach of contract into a termination for the Government's convenience and when it then misapplied the cost principles for a termination for the Government's convenience to petitioner's claim for breach of contract damages.

The decision by the Court below can be corrected only by this Court. If left to stand, the decision has the potential of becoming a harmful precedent for sanctioning high handed action by the Government in the constantly growing, increasingly important field of Federal procurement. Considerations about five elements of the decision which need correction in the interest of just relations between the Government and its private suppliers follow.

I. The Court Below Effectively Enacted "Judicial Legislation" Defeative of the Intent of Congress Regarding the Scope of the Court's Own Jurisdiction

When the Congress of the United States established the Court of Claims by the Act of February 24, 1855, ch. 122, 10 Stat. 612, it established a judicial forum for suits against the Government on express and implied contracts. A few years later, the Court of Claims attempted to place a condition of its own creation upon the right to sue the Government in contract; by rule, the Court of Claims sought to require a claimant to have first taken his claim through the department which might have entertained the claim in the first place be-

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fore he prosecuted it in the Court. This Court, however, in the contract suit of *Clyde* v. *United States,* 20 Law. Ed., 80 U.S. 479 (1871), held that the Court of Claims had no right to condition the jurisdiction conferred upon it by Congress. This Court aptly pronounced in *Clyde* at page 481 that the objectionable rule of the Court below "was really an additional restriction in the exercise of jurisdiction by that Court. It required the claimant to do what the Acts giving the Court jurisdiction did not require him to do before it would assume jurisdiction of his case."

The analogy with the present suit is evident. Here, the Court below made up a condition of its own, namely, Governmental "bad faith" or "clear abuse of discretion," before it would exercise the jurisdiction conferred upon it by Congress of deciding the merits of a breach of contract suit against the Government. Thus, in considering petitioner's claim of breach of contract by the Government, the Court below never addressed itself to the merits of petitioner's claim. The theory of the Court below was that petitioner had not met the condition which the Court below had effectively placed upon its own jurisdiction over breach of contract suits against the Government, namely, the condition of Governmental "bad faith" or "clear abuse of discretion."[8]

In contrast to the unwarranted rule of law fashioned by the Court below, the actionability of the Government's breach of a contract is soundly stated by the United States District Court in *United States* v. *Thompson* (E.D. Ark. W.D.), 293 F. Supp. 1307 (1967) at 1312:

> "... If the Government makes a valid contract and breaches it, then it would seem the breach is action-

[8] See opinion of the Court below, Appendix A, at p. 11a.

able regardless of whether the breach was negligent, or whether it was intentional, or whether it was fraudulent or mala fide."

II. To Petitioner's Prejudice, the Court Below Badly Misconceived the Meanings of "Bad Faith" and "Clear Abuse of Discretion"

According to the case which petitioner presented to the Court below, the Government, through the Federal Supply Service, General Services Administration, breached its primary source of supply contract with petitioner, particularly the "Scope of Contract" and "Special Requirements" provisions thereof, violated related Federal regulations issued and published under the statutory authority of the Administrator of General Services, gave only lip service to the Federal Specification incorporated into the contract, wrongfully withheld requirements information from petitioner, the primary source of supply contractor, and unreasonably favored a second supplier over petitioner in setting up the former as a second source of supply of thermal developing film for all Government agencies. In addition, petitioner's post hearing statement and brief, filed pursuant to an order by the Court below, and petitioner's amended petition, which was not accepted by the Court below, specifically indicated Governmental bad faith and clear abuse of discretion in the framework of supporting allegations of fact.

In its evaluation of petitioner's case on cross motions for summary judgment, the Court below focused on the issue of Governmental bad faith or abuse of discretion and bypassed the central issue of breach of contract as well as the issue of the Government's violation of its own regulations. The Court below arbitrarily and erroneously equated "bad faith" and "abuse of discretion," improperly implicating petitioner in this unwarranted

equation of two clearly different concepts,[9] and then defined "bad faith" in excessively narrow terms for purposes of taking the measure of petitioner's case while omitting any consideration of "abuse of discretion." The Court below defined "bad faith" in the extreme terms used by the Court below in earlier cases involving Governmental bad faith, as follows: "motivated above by malice' ", " 'conspiracy . . . to get rid of plaintiff' ", "designedly oppressive' ", " 'actuated by animus toward the plaintiff' " and " 'malice or conspiracy against plaintiff' ".[10] In the same vein, the Court below noted: "In the cases where the Court has considered allegations of bad faith, the necessary 'irrefragable proof' has been equated with evidence of some *specific intent to injure the plaintiff*" [11] (italics used by the Court below).

Obviously, the universe of "bad faith" is much larger than the concepts of "malice", animus" or "intent to injure". The American Law Institute, for example, while addressing itself to the proposition that every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement, commented on bad faith as follows:

> ". . . bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among

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[9] Opinion of Court below, Appendix A, at pp. 3a-4a.

[10] Id. at p. 5a.

[11] Id.

> those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party performance." [12]

By applying an unfair, wholly unreasonable norm in assessing the issue of "bad faith" and by giving no consideration to the issue of "clear abuse of discretion," the Court below without justification cut off petitioner's chance to prove at trial that it was entitled to breach of contract damages even within the questioned condition prescribed by the Court below. Petitioner's right of redress under 28 U.S.C. § 1491, under which it is permitted to sue the Government for breach of contract in the Court of Claims, was arbitrarily rendered meaningless by that very Court, the premier agent of the Judicial Branch of Government for handling contract claims against the United States.

III. The Court Below Disregarded Federal Supply Service's Violations of Federal Property Management Regulations and Federal Procurement Regulations Which Were Inherently Involved in Federal Supply Service's Breach of Petitioner's Primary Source of Supply Contract

Under his authority at 40 U.S.C. § 481(a) and § 486 (c), the Administrator of General Services issued Federal Property Management Regulations (41 CFR Chapter 101) and Federal Procurement Regulations (41 CFR Chapter 1). Reflective of his exercise of legislative authority delegated by Congress to the Adminis-

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[12] *Restatement of the Law, Second, Contracts 2d,* Tentative Drafts Nos. 1-7, Revised and Edited, Chapter 9, "The Scope of Contractual Obligations", Topic 2, "Considerations of Fairness and the Public Interest". American Law Institute, 1973.

trator of General Services, these regulations have the force of law and are binding upon anyone concerned with them. See *Public Utilities Commission of California* v. *United States,* 355 U.S. 534 at 542-43 (1958); *Paul* v. *United States,* 371 U.S. 245 at 255 (1963); also, *Davis, Administrative Law Treatise,* §5.03. The Court below itself purported to look to the Federal Procurement Regulations for criteria as to what costs and profit are and are not allowable in a termination for the Government's convenience.

However, neither the Court below nor Federal Supply Service paid heed to Federal Property Management Regulations and Federal Procurement Regulations which were violated by the Federal Supply Service in its administration of petitioner's primary source of supply contract. The Government's breach of petitioner's contract and its violations of related Federal regulations were in parallel; they were different sides of the same coin.

The Federal Property Management Regulation defining the primary source of supply concept [13] directs that, with certain exceptions not relevant here, the Government agencies designated in primary source of supply contracts shall use the schedules of such contracts on a mandatory basis and that such contracts will be primary sources of supply for the items involved. If Federal Supply Service had met its obligation under this Federal Property Management Regulation, there would have been no breach of the "Scope of Contract" provision [14] of petitioner's contract.

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[13] 41 CFR 101-26.401-2, "Primary source of supply concept", Appendix G at p. 37a.

[14] Pertinent part of "Scope of Contract" provision at Appendix I, p. 48a.

Similarly, if Federal Supply Service had abided by the Federal Property Management Regulations, entitled "Request for waivers" and "Similar items", [15] it would not have breached the "Special Requirements" provision [16] of its primary source of supply contract with petitioner. That is, Federal Supply Service would have followed the prescribed waiver procedure, if it had been deemed necessary, for the benefit of Internal Revenue Service and it would not have set up a second source of thermal developing film supply for all Government agencies.

Again, in both the Federal Property Management Regulations and the Federal Procurement Regulations, there is the direction that Federal Specifications shall be used by all Federal agencies in the procurement of supplies covered by such specifications.[17] Also, in the Federal Property Management Regulation authorizing qualified deviations from Federal Specifications, it is confirmed that existing Federal Specifications "shall be used to the maximum extent possible." [18] Federal Supply Service, however, without checking out the

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[15] 41 CFR 101-26.100-2, "Request for waivers" and 41 CFR 101-26.401-3, "Similar items", Appendix G at pp. 35a and 38a, respectively.

[16] "Special Requirements" provision at Appendix J, p. 49a.

[17] Applicable Federal Procurement Regulations, namely, 41 CFR 1-1.305-1, "Mandatory use of Federal Specifications", 41 CFR 1-1.305-2, "Exceptions to mandatory use of Federal Specifications", and 41 CFR 1-1.305-3, "Deviations from Federal Specifications", appear at Appendix H, pp. 43a-44a. Comparable Federal Property Management Regulations appear at Appendix G, pp. 40a-41a.

[18] 41 CFR 101-29.205, "Deviations from Federal Specifications," Appendix G at pp. 41a-42a.

speed capabilities of Federal Specification film, enforced the wholly unauthorized preference of film from the second supplier solely on the basis that Federal Supply Service had capriciously determined such film to be non-spec film. Once more, had Federal Supply Service honored its obligation under Federal regulations to use Federal Specification supplies there would have been no breach of contract.

Lastly, when the Court below evaluated petitioner's case for Governmental "bad faith" and "clear abuse of discretion", it gave no consideration to Federal Supply Service's arbitrary and capricious conduct in violating the Government's own regulations. So far as the Court below was concerned, such conduct was apparently of no account.

IV. When the Court Below Converted the Government's Breach of Contract Into a Termination for the Government's Convenience, It Rewrote the Contract Between Petitioner and Federal Supply Service to the Former's Great Disadvantage.

The constructive termination for the Government's convenience which the Court below imposed upon the explicit contractual relationship between petitioner and Federal Supply Service rewrote the contract's provision entitled, "Termination for Convenience of the Government." The first paragraph of that provision spells out the requirement of notice to the contractor as follows:

> "(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, when the Contracting Officer shall determine that such termination is in the best interest of the Government. *Any such termination shall be effected by delivery to the Contractor of a Notice*

of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective." Italics supplied.

When the Court below forced upon petitioner a constructive termination for the Government's convenience and left the whole issue of breach of contract in legal limbo, it wiped out for all practical purposes the italicized part of the above contractual provision. The Court below insisted upon the application of the termination for Government's convenience provision, with its limitations upon the recovery of profit and contractor costs, even though Federal Supply Service did not give to petitioner the required notice of termination. The terms of the contract which petitioner entered into were not the same ones which the Court below chose to enforce. In fact, the Court below permitted Federal Supply Service to reap the benefit of a termination for the Government's convenience when Federal Supply Service never wanted, intended or attempted to terminate, cancel or otherwise close out or suspend the contract.

Aside from other circumstances, the complete absence of any Government interest to wind up its contract with petitioner, the Government's active continuation of the contract for the contract's full term, and the routine inclusion in the contract of a standard termination for convenience clause readily distinguish petitioner's case from *College Point Boat Boat Corp.* v. *United States,* 267 U.S. 12 (1925), which has been relied upon by the Court below in evolving its own legal theory for converting a breach of contract by the Government into a termination for the Government's convenience. See *John Reiner & Co.* v. *United States,* 163 Ct.Cl. 381 at 391-393, 325 F.2d 438 (1963)

cert. denied, 377 U.S. 931 (1964), wherein, according to the Court below, it first applied its constructive termination for convenience doctrine;[19] *Charles R. Nesbitt* v. *United States,* 170 Ct.Cl. 666 at 670, 345 F.2d 583 (1965), *cert. denied,* 383 U.S. 926 (1966); and *G. C. Casebolt & Co.* v. *United States,* 190 Ct.Cl. 783 at 786-787, 421 F.2d 710 (1970). In *College Point Boat Corp.,* this Court simply denied breach of contract damages after the Navy Department, following the Armistice, failed to obtain the contractor's consent to a termination (the contract having no termination clause) and had later invoked the theretofore overlooked Federal statute, under which the contract was entered into, permitting the Government to suspend or terminate the contract.

Through the legal fiction of a constructive termination for the Government's convenience, the court below effectively transferred the standard termination for convenience clause in petitioner's contract to a license for the Government to breach the contract without penalty. The Court below regarded the dishonorable action of breaching a contract as being on a parity with the permissible conduct of terminating a contract.

Further, when the Court below impressed a termination for the Government's convenience upon the contractual relationship between petitioner and Federal Supply Service despite Federal Supply Service's lack of notice to petitioner, the Court below acted in disregard of Federal Procurement Regulation 1-8.202, entitled "Notice of termination", which specifies: "Contracts shall be terminated for convenience only by written notice to the contractor . . ."[20]

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[19] Opinion of the Court below, Appendix A at p. 11a.

[20] Full text of regulation included in Appendix H, beginning at p. 46a.

V. The Court Below Acted Arbitrarily and Capriciously When It Applied the Cost Principles for a Termination for the Government's Convenience to Petitioner's Claim for the Government's Breach of Contract.

The Court did not apply fairly the cost principles of a termination for convenience to the breach of contract situation. Quite apart from its disallowance of anticipatory profit, the Court below did not take into account the cost disadvantage to the petitioner in carrying on with the contract for the entire contract period with no notice that its contract later would be considered terminated, presumably partially, whenever a Government agency, whom petitioner may not even have known, chose to buy its thermal developing film requirements from the second supplier. Clearly, if petitioner had received the notice which it was entitled to receive under the contract provision and the Federal Procurement Regulations, petitioner could have pursued its termination rights in a timely fashion and could have protected itself against losses which it had no chance to protect against in the absence of such notice. For example, petitioner might have avoided costs relating to its challenge at the administrative level of the Government's breach of contract, such as for extra administration, quality control, testing and legal expenses, and it could have curtailed such other costs disallowed by the Court below as the cost of financing more inventory than proved to be required.

The concept of fair and reasonable judgment, decidedly underscored by the applicable Federal Procurement Regulation pertaining to termination for the Government's convenience,[21] was absent in the rejection

[21] 41 CFR 1 Part 1-8 Termination of Contracts, Subpart 1-8.3 Additional Principles Applicable to the Settlement of Fixed-Price Type Contracts Terminated for Convenience, Section 1-8.301 General, included in Appendix H at p. 47a.

by the Court below of all of petitioner's claim. The Court below relied on the unfair, unreasonable premise that lack of notice of termination meant nothing to petitioner.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 249-75

(Decided October 20, 1976)

KALVAR CORPORATION, INC. v. THE UNITED STATES

Valentine B. Deale, attorney for plaintiff.

Richard J. Webber, with whom was *Assistant Attorney General Rex E. Lee,* for defendant.

Before COWEN, *Chief Judge,* DURFEE, *Senior Judge,* SKELTON, *Judge.*

On Defendant's Motion and Plaintiff's Cross-Motion for Summary Judgment

COWEN, *Chief Judge,* delivered the opinion of the court:

This case is before the court following the court's order of June 8, 1976, directing the parties to file supplemental briefs to assist us in deciding whether the matter in dispute may be disposed of on the pending motions for summary judgment, or should be remanded for trial.

Plaintiff Kalvar Corporation was granted a "primary source of supply" contract to provide the General Services Administration (GSA) with its 1973 requirements of film

having a speed rating between 1.05 and 1.45. As acknowledged under the contract, the precise extent of the GSA requirements was to be determined by orders placed by various Government agencies through the Federal Supply Schedules.

On October 19, 1972, the Internal Revenue Service requested the GSA to supply film to meet special needs of the IRS for fiscal year 1973; specifically, the IRS sought Kalvar's M-200 film, and HS-66 film to be supplied by the Xidex Corporation. (Xidex had been a primary source supplier to GSA in the year preceding Kalvar's contract.) The GSA determined, on the basis of information supplied by Kalvar and Xidex regarding their own films, that the films requested by the IRS were beyond the scope of Kalvar's primary source contract. Kalvar contracted to supply one thickness of its M-200 film in an amendment to its original contract, and Xidex entered into an additional contract with GSA to supply three thicknesses of its H-66 film.

In December 1972, Kalvar notified GSA that it disputed the additional contract with Xidex and withdrew its prior offer to supply the M-200 film. Kalvar had tested Xidex' HS-66 film and claimed it to be within the specifications of Kalvar's original primary source contract. It then became Kalvar's contention that all GSA requirements, including the special order of the IRS, could be satisfied from Kalvar's original contract, and consequently that the GSA had breached its primary source contract by not limiting its supply to Kalvar. The GSA rejected Kalvar's contention in administrative negotiations as did the Comptroller General upon subsequent appeal. Plaintiff then commenced a breach of contract action in this court.

At oral argument, plaintiff's breach suit was apparently foreclosed by defendant's showing that it had discovered, after the briefs had been filed, that the contract incorporated standard provisions which, under the court's decision in *John Reiner & Co.* v. *United States,* 163 Ct. Cl. 381, 325

F. 2d 438 (1963), *cert. denied*, 377 U.S. 931 (1964), effectively convert any breach to a termination for convenience by the Government. On June 8, 1976, the court issued an order wherein we specifically found that such a termination-for-convenience clause was a part of the contract and requested the parties to submit supplemental briefs to determine: (1) whether defendant had evinced bad faith or a clear abuse of discretion in its actions; and (2) whether plaintiff has incurred any costs that are recoverable under the termination-for-convenience clause.

After consideration of the supplemental briefs of the parties, as well as their briefs in cross-motions for summary judgment, we find that plaintiff has failed to make a sufficient showing of bad faith or abuse of discretion by the Government. The assertions which plaintiff sets forth in its supplemental brief were all presented at oral argument and were denied by the court's order of June 8, 1976. Even if the order is disregarded and we examine each of the claims against the facts of record, we find that plaintiff has not made a sufficient showing of Governmental bad faith or abuse of discretion to raise a triable issue.

As to plaintiff's claims for recoverable costs incidental to a termination for convenience, we deny all of the specified claims as being outside the scope of the termination clause. However, we remand the case to the trial judge for a determination of the reasonable value of the legal services rendered by plaintiff's attorney in the preparation of its supplemental brief to the court.

I. *Plaintiff's Claim of Governmental Bad Faith*

Kalvar would infer Governmental bad faith from the "egregious nature" of the alleged contract violation, from a pattern of uneven, discriminatory administration" against it and in favor of Xidex, and from a alleged "willful indifference" to Government regulations. Kalvar makes no conceptual distinction between "bad faith" and "abuse

of discretion" and, for the purposes of this decision, we accept Kalvar's equation of the two concepts.[1] To support its claims of bad faith, Kalvar presents six specific "illustrations" of GSA's "clear abuse of discretion." These six illustrations center upon four specific acts of the GSA:

A. That GSA "deliberately withheld" information from Kalvar regarding the IRS's special requirement for film and failed to give it the first opportunity to meet the special requirement under the primary source contract.

B. That GSA applied a double standard of treatment when it sought out Xidex in 1973 for supplies of the IRS-requested film, since in 1972 GSA had refused an offer by Kalvar to supply "out of spec" film while Xidex held the primary source contract.

C. That GSA made a "wholly arbitrary finding" that Xidex' HS-66 film was beyond the specifications of Kalvar's primary source contract, based only on Xidex' representations and without confirmatory testing.

D. That although GSA made no distinction between Kalvar and Xidex film when it requested that the two companies' films be placed on the supply schedule, it contracted with Xidex for supply of film in three thicknesses, but contracted with Kalvar for supply of only one thickness.

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[1] We need not decide whether bad faith is tantamount to abuse of discretion, since in our view plaintiff's claims indicate neither was present here. However, many of our prior decisions seem implicitly to accept the equivalence of bad faith, abuse of discretion, and gross error. *See Librach* v. *United States*, 147 Ct. Cl. 605, 614 (1959); *Levering & Garringues Co.* v. *United States*, 71 Ct. Cl. 739 (1931); *see also* J. McBride & I. Wachtel, *Government Contracts* § 5.60[1] (1965).

II. *The Merits of Kalvar's Claims of Bad Faith and Abuse of Discretion*

Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act "conscientiously in the discharge of their duties." *Librach* v. *United States,* 147 Ct. Cl. 605, 612 (1959). The court has always been "loath to find to the contrary," and it requires "well-nigh irrefragable proof" to induce the court to abandon the presumption of good faith dealing. *Knotts* v. *United States,* 128 Ct. Cl. 489, 492, 121 F. Supp. 630, 631 (1954).

In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some *specific intent to injure the plaintiff*. Thus, in *Gadsden* v. *United States,* 111 Ct. Cl. 487 489-90, 78 F. Supp. 126, 127 (1948), the court compared bad faith to actions which are "motivated alone by malice." In *Knotts, supra,* at 128 Ct. Cl. 500, 121 F. Supp. 636, the court found bad faith in a civilian pay suit only in view of a proven "conspiracy * * * to get rid of plaintiff." Similarly, the court in *Struck Constr. Co.* v. *United States,* 96 Ct. Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was "designedly oppressive." But in *Librach, supra,* at 147 Ct. Cl. 614, the court found no bad faith because the officials involved were not "actuated by animus toward the plaintiff."

The mere fact that a contracting officer awards a contract to another company after terminating the plaintiff's contract is insufficient to show bad faith. As the court declared in *Colonial Metals Co.* v. *United States,* 204 Ct. Cl. 320, 331, 494 F.2d 1355, 1361 (1974):

> * * * that the contracting officer knew of the better price elsewhere when he awarded the contract to plaintiff—in the absence of some proof of *malice or conspiracy against the plaintiff* (*cf. Librach* v. *United*

> *States,* 147 Ct. Cl. 605, 612-14 (1959))—means only that the contract was awarded improvidently and does not narrow the right to terminate. [Textual emphasis added.]

In view of the high standard of proof required to show bad faith (tantamount to a showing of malice or conspiracy), the plaintiff here fails to make its case for two reasons. First, the plaintiff's four specific allegations of bad faith were made in the briefs or at oral argument, and thus have been decided by the court's June 8, 1976 order. The court stated in its order that "it does not agree that the facts shown in the record * * * would enable the court to determine that the defendant was guilty of bad faith * * *." Since there are no new claims of bad faith, and no new evidence beyond plaintiffs' vague offer to produce "testimony by cognizant personnel of plaintiff" (*see, e.g.,* Plaintiff's Supplemental Brief, p. 4), the court may justifiably deny plaintiff's motion.

Second, even if it is assumed that the court's June 8, 1976 order did not finally dispose of plaintiff's arguments, a close examination of these contentions in the light of the available facts discerns no support for a finding of bad faith or abuse of discretion. Plaintiff's first charge is that the GSA had an obligation to disclose to it, as primary source supplier, the IRS special request before seeking new contracts. But as defendant pointed out in its moving brief, the Comptroller General ruled that the GSA had no such duty under the primary source contract. Even if defendant's and the Comptroller General's interpretations of the contract were incorrect, an incorrect reading of the contract by Government officials is not tantamount to malice or bad faith. *Nolan Bros. Inc.* v. *United States,* 186 Ct. Cl. 602, 606, 405 F. 2d 1250, 1253 (1969).

Plaintiff's second charge of bad faith is that in 1972 the GSA had rejected Kalvar's offer to provide film beyond

the specifications of Xidex' then primary source contract, but in 1973 GSA accepted Xidex' offer to provide film beyond the specifications of Kalvar's primary source contract. However, in appendix "W" to plaintiff's cross-motion for summary judgment, it is stated that the GSA rejected Kalvar's 1972 offer precisely because GSA believed the offered film to be *within* the scope of Xidex' primary source contract. Thus, GSA's actions in 1973 were not inconsistent with its actions in 1972. It felt that the film offered by Kalvar in 1972 was within the "spec" of Xidex' contract, and thus not purchasable, whereas GSA decided that Xidex' film offered in 1973 was "out of spec" and purchasable (this determination by GSA was upheld by the Comptroller General; *see* Plaintiff's Appendix "X"). If GSA's determination was erroneous, it nevertheless does not rise to the level of an action taken in bad faith.

Plaintiff's third argument is that GSA made a wholly arbitrary finding that Xidex film (HS-66) was beyond Kalvar's 1973 contract, relying solely upon Xidex' representation and without testing the film independently. However, it is undisputed that GSA had always relied upon the manufacturers' representations regarding the specifications of their films, because GSA had no testing equipment of its own. In this instance, GSA accepted a statement made by Xidex as to the speed rating of its HS-66 film. After the speed rating was challenged by plaintiff, GSA obtained a confirmation of the statement previously made by Xidex, believing that Xidex had made a rating upon the basis of good faith testing. Plaintiff may well argue that GSA's practice was unwise in this regard and indeed the manufacturers agreed to and GSA later adopted a new testing procedure, which came too late to affect plaintiff's contract. However, even if GSA's reliance upon information furnished by Xidex was misguided or if the information was erroneous, neither of these is sufficient to show bad faith.

Plaintiff's final allegation is that GSA contracted for only one thickness of the special new film from Kalvar but contracted for three thicknesses from Xidex, and that this different treatment is indicative of prejudice toward Kalvar. But the reason for the GSA action, as the record reveals, is that Kalvar offered to supply one thickness of the film, whereas Xidex offered three. Certainly no Governmental bad faith can be inferred from treatment which resulted from plaintiff's own offers.

In summary, we hold that Kalvar has made an insufficient showing of malicious intent or "animus" toward it in order to avoid the limitations of the termination-for-convenience clause. Mere error on the part of the Government, even if it would constitute sufficient ground for contractual breach were the termination clause inapplicable, is insufficient to overcome the presumption of regularity inherent in the invocation of the termination for convenience. *Librach, supra,* at 614.

III. *Plaintiff's Claims for Cost Reimbursement*

The remaining question before us is whether, under the termination-for-convenience clause, plaintiff is entitled to the costs which it now asserts to be reimbursable. Kalvar asserts five general categories of such costs in its brief:

> A. The difference between the price of film under the Government contract and the price Kalvar obtained when it subsequently sold the "terminated inventory" to other private buyers. Asserted Cost: $13,555.
>
> B. Costs of financing plaintiff's inventory which had been prepared for meeting anticipated contract demands for film. Asserted Costs: $17,250 (18 percent of plaintiff's "average investment in inventory during the period of defendant's breach").

C. An "equitable adjustment" to compensate plaintiff for higher unit costs in its subsequent sales to the Government, brought about by lower production runs for the Government's decreased demand. Asserted Costs: $35,738.

D. Administrative, quality control and testing expenses associated with the alleged breach of contract. Asserted Costs: $3,250.

E. Legal fees incurred in administrative negotiations over the original breach of contract claims, before filing suit in this court. Asserted Costs: $14,925.

At least three of plaintiff's asserted costs (claims A, B and C) are not recoverable because they clearly pertain only to anticipatory profits, which are bared by the termination-for-convenience clause. *Colonial Metals Co.* v. *United States, supra,* at 204 Ct. Cl., 332-33, 494 F. 2d, 1362. That plaintiff seeks anticipatory profits is perhaps most evident in claim A, wherein plaintiff claims the difference between the price of film under the Government contract and the price under subsequent private contracts.

Normally upon termination, a contractor is entitled to the difference between the cost of materials purchased to perform the contract and their market price at the time of termination. *Baker Food Products Corp.* v. *United States,* 75 Ct. Cl. 591, 596 (1932). This rule applies only to the loss which a contractor would suffer upon resale. It obviously inapplicable where, as here, the contractor makes some profit upon "covering" the goods. Clearly, when a contractor seeks the difference between the prices he obtained in a profitable "covering" sale and the prices he would have obtained under the terminated contract, he is in effect demanding anticipatory profits. Indeed, plaintiff in its petition labeled this claim as one for "lost profits." (Plaintiff's Petition, p. 10, para. 25.)

Similarly, Kalvar's claim B seeks compensation for "financing costs" of the inventory it had prepared in anticipation of the Government's requirements under the primary source contract. Plaintiff carefully avoids claiming reimbursement for the costs of the inventory and supplies themselves, since those costs are expressly disallowed by 41 C.F.R. § 1-8.701(a)(2)(i).

What plaintiff fails to note is that the termination-for-convenience clause, 41 C.F.R. § 1-8.701(f) also incorporates by reference subpart 1-15.2 of the Federal Procurement Regulations. Among the provisions of that subpart, section 1-15.205-17 specifically prohibits "[i]nterest on borrowings (however represented), bond discounts, costs of financing or refinancing operations * * *." Thus even if the cost of the inventory and supplies were allowable the interest cost of financing those inventory and supplies may not be reimbursed.[2]

Plaintiff's claim C is for reimbursement for the "higher unit costs" which followed the reductions in Kalvar's Government sales (plaintiff was able to sell only a reduced quantity to other purchasers). Again, this claim looks to the unit costs Kalvar *would have enjoyed* had its original contract been continued. Thus the claim seeks consequential damages and also involves anticipatory earnings. Moreover, the claim overlooks the fact that the original primary source contract was not for a fixed supply, but rather was a "requirements" contract, which could in good faith be terminated as soon as the Government's requirements ceased. Kalvar assumed the risk of any premature termination when it entered into the contract.

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[2] If the prohibition on interest were not applicable here, it is still difficult to perceive plaintiff's argument that interest is reimbursable. The financing costs for the inventory are eventually paid by the sale of the inventory, and thus would appear to be a direct "cost of supplies," which plaintiff has already recognized as not being allowable.

The remainder of Kalvar's asserted costs (items D and E) are claims which on their face seek reimbursement for costs related to the alleged breach rather than to the termination itself. The theory underlying this position is Kalvar's belief that since breach is equated to termination for recovery purposes, "equity would seem to require" that expenses associated with breach at the administrative level "be on a parity" with expenses associated with termination.

Plaintiff's theory misconstrues the law in the area of constructive termination for convenience. In *John Reiner & Co.* v. *United States, supra,* 163 Ct. Cl. at 390-91, 325 F. 2d at 442-43, this court first applied the constructive termination-for-convenience doctrine in a case where the contracting office had not actually invoked the clause in a administering the contract. In the absence of bad faith or clear abuse of discretion, the effect of the constructive termination for convenience is to moot all breach claims and to limit recovery to costs which would have been allowed had the contracting officer actually invoked the clause. *Nolan Bros., Inc., supra,* at 186 Ct. Cl. 608-10, 405 F. 2d 1254-55. Thus, although the Government has contested all of Kalvar's breach claims, we need not consider the merits of any claim for breach of contract here. Any award of damages must be limited to items specifically allowed by the termination clause.

It follows the Kalvar's claim D, for reimbursement of administrative and other expenses associated with the alleged breach, may not be granted in this case because the allowance of such costs would in effect permit recovery of some of the underlying breach claims. This would render the termination procedure meaningless. The termination-for-convenience clause, 41 C.F.R. § 1-8.701 limits recovery to: (a) completed supplies accepted by the Government, (b) costs of performance of terminated work, and (c) costs of settling and paying claims arising out of the termination. 41 C.F.R. § 1-8.701(e)(1-3). Although the expenses sought in

claim D are administrative, and in that sense resemble costs of settling and paying claims under (c) above, they do not arise out of the "termination," but rather out of an alleged breach. Hence they may not be recovered here.

Plaintiff's claim E, for legal fees involved in the assertion of breach claims, presents a more difficult and novel problem. Under the preceding analysis, plaintiff may not of course recover legal fees associated purely with the breach claims. However, we must decide whether Kalvar may recover legal expenses that should properly be considered as settlement expenses in a termination for convenience by the Government.

The termination-for-convenience clause, 41 C.F.R. § 1-8.701(e)(3), explicitly allows "reasonable costs of settlement, including * * * legal * * * expenses reasonably necessary for the preparation of settlement claims." Normally these expenses would arise at the administrative level, in negotiation following the contracting officer's termination order. Here, however, the termination is constructive, by imposition of the court, and hence plaintiff had no opportunity to engage in settlement negotiations at the administrative level. In essence, plainiff's legal expenses in preparation for settlement were incurred when it filed its supplemental brief pursuant to the court's order that it prepare "a statement as to whether plaintiff incurred any costs that are recoverable under the termination-for-convenience clause * * *."

We are well aware that section 2412 of title 28 of the U.S. Code prohibits the court from awarding attorney's fees in "any civil action brought by or against the United States * * *." However, we view the principles of the statute to be inapplicable to costs which, had proper procedures been followed, would naturally have arisen in the process of settlement rather than in a court action brought against the United States. Section 2412 is expressly limited to "civil actions," and thus applies only to adversary proceedings in

the process of litigating actual disputes. Here, the claim for attorney's fees arose after litigation began, but it is distinctly separate from the underlying breach claims asserted by plaintiff. Rather than being a proper part of the civil action, attorney's fees that pertain to the procedure of a negotiated settlement are unrelated to the assertion of disputed contract rights.

In determining the allowability of a contractor's claim for attorney's fees, it is the nature and form of the legal activities, rather than the time when costs for legal services were incurred, which provide the proper focus of inquiry. Thus, in *Acme Process Equipment Co.* v. *United States,* 171 Ct. Cl. 251, 347 F. 2d 538, (1965), this court allowed legal fees incurred in an unsuccessful termination settlement even though the fees were for work performed after the plaintiff had filed an administrative appeal.

The distinction recognized in *Acme Process* is consistent with the position espoused by the Boards of Contract Appeals. Although the Boards frequently note the prohibition against attorney's fees and refuse to reimburse the contractor for costs not specifically permitted by contract provisions, they will allow legal fees "to the extent reasonably necessary for the preparation and presentation of settlement proposals * * *." *Reed & Prince Mfg. Co.,* ASBCA 3172, 59-1 BCA 2172 at 9484 (1959). *See also, Appeal of Grumman Aerospace Corp.,* NASA BCA 87311, 76-1 BCA 11763 (1976).

As previously noted, the constructive termination for convenience is a legal fiction which imposes the standard limitations of the termination clause upon a plaintiff even though the termination was never actually ordered by the contracting officer. The court in such a case proceeds as if the termination had in fact been ordered. Since the constructive termination for convenience limits the contractor to those claims he would have incurred had there been an actual termination, it is only fair to allow the contractor the

equivalent of the legal expenses he would have incurred in preparing a settlement claim after actual termination. In this case, these are the costs Kalvar has incurred as a result of the court's order. Admittedly, our allowance of legal expenses in this case rests upon a liberal reading of the termination clause and upon an analogy drawn between termination costs in administrative procedings and similar costs resulting from a court-imposed convenience termination. The use of such an analogy has been specifically approved by this court for solving the uncertain and difficult questions that arise in constructive termination-for-convenience cases. *Inland Container Co.* v. *United States,* 206 Ct. Cl. 478, 493, 512 F. 2d 1073, 1081 (1975).

The only costs which plaintiff is entitled to recover as "legal expenses reasonably necessary for the preparation of settlement claims" are the reasonable attorney's fees which plaintiff incurred in the preparation and filing of "Plaintiff's Supplemental Statement And Brief," which was filed pursuant to the court's order of June 8, 1976. Since there is no evidence of the cost or reasonableness of the fee, it is necessary to remand the question to the trial judge for his determination.

IV. *Conclusion*

The case is remanded to the trial judge for his determination by trial or other proceeedings of the reasonable cost of preparing and filing "Plaintiff's Supplemental Statement And Brief." Except for this unresolved question, defendant's motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 249-75

KALVAR CORPORATION V. THE UNITED STATES

Before COWEN, *Chief Judge,* DURFEE, *Senior Judge,* and SKELTON, *Judge.*

Order

This case comes before the court on plaintiff's motion, filed November 24, 1976, for rehearing pursuant to Rule 151(b) and on plaintiff's motion, filed December 8, 1976, for leave to amend the petition. Upon consideration thereof, together with the responses in opposition thereto, without oral argument,

IT IS ORDERED that plaintiff's said motions, filed November 24, 1976, and December 8, 1976, be and the same are denied.

BY THE COURT

/s/ WATSON COWEN
Watson Cowen,
Chief Judge

Jan. 7, 1977

APPENDIX C

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-177719 DATE: MARCH 29, 1974

MATTER OF: Kalvar Corporation

DIGEST: 1. Where Government was obligated to purchase its normal requirements of film from primary source FSS contractor, such contractor would be entitled to damages if it can be shown that agency purchased higher speed film from multiple-award FSS contractor to satisfy normal requirement which could have been met by film specified in primary source FSS contract. However, breach was not established by purchase of high speed film from multiple-award FSS contractor since record shows that purchase was necessitated by agency's special requirements for film which exceeded specification characteristics of film provided by primary source FSS contractor.

2. Since some overlap exists between film listed on primary source FSS contract and multiple-award FSS contract, GAO recommends that GSA regulations be modified to prohibit use of multiple-award FSS contract where needs of agency would be satisfied by purchase from primary source contractor.

Kalvar Corporation (Kalvar) was awarded contract No. GS-00S-12756, covering the Federal Supply Schedule (FSS) requirements for various types of vesicular microfilm under Federal Specification L-F-320b, for the period July 1, 1972, through June 30, 1973. Insofar as is pertinent here, the Federal Specification, as amended, called for various sensitometric characteristics for the film, including a

speed rating range of 1.05 to 1.45 for class 2, Subtype A film. The Scope of Contract provision in the solicitation stated that the ensuing contract would cover the normal supply requirements of all departments and independent establishments. The solicitation also provided that the following provision would be included in the resultant FSS contract:

> "Where an agency required, under (a) of the Scope of Contract provision [all departments and independent establishments with certain exceptions not pertinent here], to use the contracts listed herein, finds that the specific articles or services contracted for will not meet a special requirement, articles or services having the same general characteristics needed to meet the special requirement may be procured: provided, that a prior written waiver of the requirement for using this Schedule is obtained from the General Services Administration. Requests for such waivers shall be submitted to the Commissioner, Federal Supply Service, General Services Administration, Washington, DC 20406, in accordance with Section 101-26.401-3 of the Federal Property Management Regulations and any implementing regulations of the requesting agency."

On October 19, 1972, the Internal Revenue Service (IRS) submitted a request to GSA to establish schedule arrangements for the supply of both Kalvar Mikrolith 200 vesicular film and Xidex HS-66 vesicular film for the remainder of fiscal year 1973. The reason for the request, as stated by IRS, was that the FSS contract for fiscal year 1973 listed film which would operate at a speed of 60 feet per minute whereas IRS' equipment operated most efficiently using film with a speed of 200 feet per minute. IRS stated that the prior FSS contract had listed film which ran at both 60 and 200 feet per minute and that IRS was presently purchasing "off schedule" to meet its requirements. In addition IRS informally advised GSA that the film

provided by Kalvar under its primary source schedule contract was not suitable for use on late model IRS machines when operated at their maximum setting. Specifically, it was reported that the contract film did not provide a satisfactorily sharp and clear image at the maximum setting. This determination was made as a result of trial runs conducted by IRS with the contract film.

Thereafter, GSA's technical staff was requested to verify whether the Kalvar Mikrolith 200 film and the Xidex HS-66 film were outside the scope of specification L-F-320b. A memorandum dated November 7, 1972, indicates that GSA's technical staff concluded that the Xidex HS-66 film and Kalvar Mikrolith 200 film were outside the scope of the specification covered by Kalvar's FSS primary contract, based on data sheets furnished by these firms. The data sheets submitted by Xidex indicated that its HS-66 film had a speed rating of 1.50 and Kalvar's data sheets showed speed ratings of 1.75 and 2.00 for the Mikrolith 200 film. The finding of GSA's technical experts was that all of these speed ratings fell outside of the speed range of 1.05 to 1.45 in the specification L-F-320b, for class 2, Subtype A film.

After receipt of the above advice from the technical staff, GSA's purchasing office requested Kalvar and Xidex to submit offers relating to the listing of their respective high speed film on a multiple-award FSS, and both Kalvar and Xidex submitted offers. GSA reports that the speed rating was the primary basis for establishing listings on the multiple-award FSS for the HS-66 film and the Mikrolith 200 film. GSA determined that these offers were suitable and reasonable as to price and commitment documents were issued by GSA to Xidex and Kalvar during the latter part of November 1972. The price listed for the Xidex HS-66 film was lower than the price of Kalvar's film covered under its primary FSS contract. Following the establishment of these commitments, Kalvar by telegram dated

November 30, 1972, requested that the listing of the Mikrolith 200 film be cancelled. By letter of December 11, 1972, Kalvar advised GSA that tests had been conducted on the Xidex HS-66 film in accordance with the methods in specification L-F-320b, which indicated that this film was within the range of the speed ratings in Kalvar's primary FSS contract. On December 18, 1972, GSA affirmed its decision that both the Xidex HS-66 film and the Kalvar Mikrolith 200 film could be listed on negotiated multiple-awarde FSS through June 30, 1973, since the films were outside the scope of specification L-F-320b.

Kalvar contends that the characteristics of the Xidex HS-66 film were within the parameters of its primary FSS contract and that by listing the Xidex HS-66 film on the multiple-award FSS, GSA breached the provision which stated that the normal supply requirements of the agencies would be purchased from Kalvar. It is urged that GSA's breach entitles Kalvar to damages.

The arguments made by Kalvar in support of its claim and GSA's responses thereto are set forth below as follows:

(1)Kalvar urges that tests it conducted on the Xidex HS-66 film in accordance with the Federal Specification established that the film was within the scope of Kalvar's primary FSS contract.

GSA has not furnished our Office with any actual test since at the time that the Xidex HS-66 film was listed on the multiple-award FSS, GSA did not have the facilities to make such tests. However, GSA has forwarded a letter from Xidex which states that the sample of Xidex HS-66 film which Kalvar tested was not representative of the film actually sent to the IRS, and that the film it furnished IRS was 35 percent faster than the samples tested by Kalvar. GSA has also forwarded a memorandum prepared by its technical staff which provides the following account with

respect to the "diffusion" method of testing in specification L-F-320b (the method used by Kalvar in testing the sample of Xidex HS-66 film):

> "As various companies joined the vesicular film manufacturing field, and the technology advanced, it was progressively found that that method (diffusion) was lacking in accuracy and reproducibility. By varying the exposure time, developing time, temperatures, using different instrumentation in the field of sensitometers and densitometers designed for use with silver film and not specifically for the vesicular type, wide variations in speed could be obtained. Hence, the condition of lack of accuracy and reproducibility in that system.
>
> "The above situation led to the development of the 'projection approach' methodology currently in the revised specification, Interim L-F-00320C, endorsed by the entire industry, including Kalvar (Kalvar participated in the development of that method as part of the inter-company efforts for a standard). Work in this new measurement procedure is continuing, aimed at improving, perfecting, as technology continually advances.
>
> "With specific parameters provided by the manufacturers, increased knowledge in accurate calibration and modification of photographic measuring instruments, the projection approach promises to be far more reliable and reproducible, the requisite for conduciveness to obtaining uniformity in the resulting test values, by industry as well as Government."

Kalvar's comment with respect to the above information is that it is "opportunistic" and "after the fact" and should not be considered at this time.

> (2) Kalvar urges that the margin between the upper limit of the speed rating (1.45) of Type I, Subtype A,

class 2 film in the Federal Specification is so close to the speed rating of the Xidex HS-66 film (1.50) that the difference is not sufficient to establish that the Xidex HS-66 film was outside the scope of Kalvar's contract. Tied in with the above is Kalvar's argument that because of the "looseness" of Federal Specifica- L-F-320b, film capable of running on duplicating equipment at 200 feet per minute was included within the excessively broad limits of the required sensitometric characteristics. For this reason Kalvar urges that as a matter of fair administration of Kalvar's primary source contract by GSA, Kalvar should have been given the opportunity to meet the requirements of the IRS under its contract. Kalvar has also referred to apparent inconsistent treatment in fiscal year 1972 when the upper limit for the speed rating in the specifications was 1.25 (compared to a speed rating of 1.45 in fiscal year 1973) and GSA did not permit Kalvar to list its Mikrolith 200 film on the FSS schedule when Xidex had the primary source contract. See B-174427, July 14, 1972 and March 9, 1973.

GSA concedes that there were problems with the specifications for fiscal year 1973 and we have been advised that GSA as well as industry has been working on improving the specification. GSA has further advised that it had to rely to a large degree on information furnished by the user agencies as well as the suppliers in making the type of determination required in this case since GSA did not have the necessary facilities to make independent tests. In this regard, once IRS advised that it needed faster film than that being furnished under Kalvar's contract, and the available information supported that the film requested by IRS had a higher speed rating than that specified in Kalvar's primary source FSS contract, GSA concluded that a multiple-award FSS listing was appropriate since Kalvar would not be obligated to furnish the faster film required

by IRS. With respect to the alleged prior inconsistent treatment of Kalvar, GSA has advised that Kalvar's Mikrolith 200 film was not listed in fiscal year 1972 since the film being furnished under the FSS contract was found to comply with and actually exceed the requirements of the Federal Specification for that year. This conclusion was based on the fact that no complaints had been received from user agencies that the film which was being furnished by Xidex, the FSS contractor for that year, did not meet their requirements. GSA has concluded that a different situation existed in fiscal year 1973, in view of IRS' request of October 19, 1972.

(3) Kalvar has referred to a letter from IRS dated June 5, 1973, to GSA and contends that the various additions to the specification proposed in the letter were not necessary since those characteristics were already included in the applicable specification. Kalvar urges that IRS' letter of June 5, 1973, should be considered as an example of the type of detail that can be furnished by an agency which is not satisfied with a specification for vesicular film. It asks us to compare the June 5, 1973 letter from IRS, with that of October 19, 1972, which merely referred to the speed rating but did not refer to the other characteristics that IRS needed. Kalvar argues that the October 19 letter did not adequately define IRS' requirements.

GSA states that the June 5 IRS letter was solicited by GSA to obtain its views on the revision of the specification for the fiscal year 1975 requirements and that the letter has little, if anything, to do with the issues in this case.

(4) Kalvar argues that the provision in its primary source FSS contract requiring agencies to obtain a *waiver* from GSA in order to procure special requirements was the only procedure that could be used in the event that an agency's requirements could not be

satisfied under Kalvar's FSS contract. In this regard Kalvar has referred to various sections of the Federal Property Management Regulations (FPMR) and has urged that by listing Xidex on the multiple-award FSS with prices below Kalvar's FSS contract, GSA "undercut" Kalvar's FSS contract, thereby giving Xidex "two bites at the apple." In support of this assertion, Kalvar has submitted selected pages from Xidex' Form S-1 which was filed with the Securities and Exchange Commission indicating that Xidex and Kalvar have been engaged in a price war with respect to "photographic heat film."

GSA states that it has the authority to list articles on a multiple-award schedule and that it was proper to exercise this authority pursuant to IRS' request in the circumstances of this case. GSA has confirmed that the price of Xidex HS-66 film was lower than the price of the closest comparable film listed on Kalvar's primary source FSS contract. GSA has not denied that there was some overlap between the film listed on Kalvar's FSS contract and the Xidex HS-66 film in that the Xidex HS-66 film was capable of being used at lower speeds in lieu of the film listed on Kalvar's primary source FSS contract. It is GSA's view that it would not be proper for an agency to purchase the Xidex HS-66 film listed on the multiple-award FSS schedule merely to take advantage of the lower price of that film where the film listed on Kalvar's primary source contract was adequate to meet the requirements and the Xidex film exceeded its requirements. GSA had advised that it did not monitor whether agencies engaged in such practices.

Our Office has contacted representatives of the IRS and the Social Security Administration (SSA), the primary users of the high speed type of film under consideration. The IRS representative advised that the speed of the film that an agency might require depends on such factors as the speed capability of the machine which would process

the film, the light level of the equipment, and the developing drum temperature. We were further advised that the Kalvar Mikrolith 200 film and the Xidex HS-66 film were the only two types of film known to the IRS that had the capability of meeting its needs and that this determination was based primarily on the speed rating of these two films. The SSA advised that its needs were met by film purchased from Kalvar's primary source contract and that such film could be satisfactorily operated on SSA's equipment at a speed of 200 feet per minute.

Kalvar's counsel was informally advised of the substance of our conversations with the IRS and the SSA representatives, and he urged that the advice from SSA supports its position. With respect to IRS, counsel for Kalvar reiterated the prior arguments that Kalvar was never given the opportunity to meet IRS's needs and that the film in the upper speed limits of its FSS contract would have been adequate to meet IRS' needs if Kalvar had been advised of the specific nature of the requirements.

Based on a review of the terms of Kalvar's contract we believe it is clear that the Government was obligated to purchase all its normal requirements of the film listed on that contract from Kalvar. It was on the basis of this obligation that the various firms competed for the primary FSS contract and this obligation was firm for the fiscal year covered by the contract. Therefore, Kalvar would be entitled to damages if it can be shown that an agency purchased the Xidex HS-66 film during the term of Kalvar's primary source FSS contract and that the film listed on Kalvar's FSS contract was adequate to meet the agency's requirements. The only instance presently before our Office where an agency apparently purchased the Xidex HS-66 film involves the above-cited purchases by IRS. However, the record presented does not support the conclusion that IRS' purchase of Xidex HS-66 film constituted a breach of Kalvar's primary source FSS contract since it has been

reported that IRS' equipment required film that exceeded the speed rating of the film listed on Kalvar's FSS contract.

Moreover, since IRS had need for film with a higher speed rating than Kalvar was furnishing, IRS could have obtained a waiver and independently procured for this need on a competitive basis. We do not think Kalvar's contract gave it the right to upgrade its contract film to meet additional Government requirements. In such circumstances the waiver provisions cannot reasonably be construed as having precluded GSA from meeting additional requirements through a multiple-award FSS.

However, since it has not been disputed that there was some overlap between the film listed on Kalvar's FSS contract and the Xidex HS-66 film, it is questionable whether GSA should have relinquished the control it might otherwise have had under the waiver procedure without establishing a safeguard for preventing possible misuse of the multiple-award FSS. Accordingly, we think the FPMR should be modified to expressly preclude the purchase of items listed on a multiple-award FSS in any case where another item which is listed under primary source FSS contract will satisfy the requirement. While this problem may not recur in the purchase of film since GSA is working to improve the specifications and is acquiring independent test facilities, the suggested modification would provide protection should a similar problem arise in connection with other requirements where more than one listed item serves the required functional purpose.

/s/ ROBERT F. KELLER
Deputy Comptroller General
of the United States

APPENDIX D

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-177719 DATE: October 23, 1974

MATTER OF: Kalvar Corporation

DIGEST: 1. GAO affirms B-177719, March 29, 1974, 53 Comp. Gen. ——, holding that Government did not breach a primary source contract for film when, pursuant to a special requirement, it purchased another supplier's film which exceeded the speed rating of the primary source contractor's film.

2. Determination that agency has requirement outside scope of primary source FSS contract is proper when based on fact that film provided under primary source contract could not meet requirement of agency.

Counsel for Kalvar Corporation (Kalvar) has requested reconsideration of our decision in *Matter of Kalvar Corporation,* B-177719, March 29, 1974, 53 Comp. Gen. ——. In this decision the Comptroller General held, *inter alia,* that while the Government was obligated by its primary source contract to purchase its normal requirements for certain vesicular microfilm from Kalvar, the primary source contractor listed on the Federal Supply Schedule (FSS), a breach of contract was not established by the purchase of a higher speed microfilm from a multiple award FSS contractor. Reconsideration of this decision is requested by Kalvar on the basis that the decision did not give proper effect to the evidence or to the Government's legal obligations under the Kalvar contract.

Upon reconsideration of the matter we remain persuaded that the Government did not breach its primary

source contract with Kalvar when, pursuant to a special requirement, it purchased another supplier's film which exceeded the speed rating of the film Kalvar had been furnishing under its contract.

To summarize the situation briefly, Kalvar was awarded FSS contract No. GS-OOS-12756 covering normal Government supply requirements for various types of vesicular microfilm for fiscal year 1973. The Federal specification, L-F-320b, controlling the scope of the contract required the film to meet various sensitometric characteristics, including a speed rating of 1.25 ± 0.20 for the type IA2 film, the type film involved in this dispute. On October 12, 1972, the IRS requested that the General Services Administration (GSA) establish a FSS arrangement for the supply of higher speed-rated Kalvar Mikrolith 200 and Xidex HS-66 vesicular film. The request resulted from the use at IRS of equipment capable of processing film at 200 feet per minute. In the previous year IRS had purchased the primary source contract film and used it without difficulty since in that year most of IRS's equipment was capable of operating at a maximum speed of 60 feet per minute. Because of the new speed requirements of the late model IRS equipment, IRS advised GSA that the film provided by Kalvar under its primary source contract for fiscal year 1973 was not suitable for use on its machines since the contract film did not provide a satisfactorily sharp and clear image when the machines were operating at their maximum setting. Such a determination was made as a result of trial runs conducted by IRS with the contract film.

GSA then sought to make a determination of whether the Mikrolith and Xidex HS-66 films were outside the scope of the specification governing the primary source contract. GSA's technical staff concluded that both films requested by IRS were outside the scope of the specification. Thereupon GSA requested Kalvar and Xidex to sub-

mit offers for their respective high speed film for listing on a multiple-award FSS. Both Kalvar and Xidex submitted offers, and GSA determined that these offers were suitable and reasonable and commitment documents were issued by GSA to both offerors in the latter part of November 1972.

On November 30, 1972, Kalvar requested that the listing of its Mikrolith film be canceled. Kalvar further advised GSA that it had conducted tests on the Xidex HS-66 film in accordance with the method provided in the specification and found that Xidex film had a speed rating within the "range" of speed ratings in Kalvar's primary source contract specifications. GSA, however, on December 18, 1972, affirmed its decision that both the Mikrolith and Xidex films were outside of the specification range and could be listed on the negotiated multiple-award FSS. Kalvar then filed a request for relief with the Comptroller General.

Kalvar contended to this Office that the sensitometric characteristics of the Xidex HS-66 film were within the parameters of its primary source FSS contract and that by listing the Xidex film on the multiple-award FSS, GSA breached the provision of the Kalvar contract which stated that the normal supply requirements of the agencies would be purchased from Kalvar. Kalvar also urged that the GSA breach entitled it to damages.

In our prior decision we noted that GSA did not have the in-house technical facilities for testing microfilm. It was known by GSA, however, that Kalvar's specification film was not meeting IRS's requirement for film which would function efficiently on IRS machines at 200 feet per minute, and that Kalvar Mikrolith 200 and Xidex HS-66 film had the capability, based on speed ratings, of meeting this requirement.

Relying on the Kalvar and Xidex literature the GSA technical staff determined that the Mikrolith 200 speed rat-

ing was 1.75 while that for Xidex HS-66 was 1.50, both beyond the speed rating of 1.25 ± 0.20 prescribed by the specification. Although the finding with regard to HS-66 film was disputed by Kalvar on the ground that its own tests showed that HS-66 film was within the specification, the GSA staff felt that widely varied test results could be obtained by varying the exposure time, developing time and the type of instrumentation involved. Accordingly, Kalvar's assertion that it tested Xidex HS-66 and found that it was slower than 1.45 was not deemed controlling by GSA, especially in the light of a letter from the Director of Research for Xidex to the effect that the Xidex film provided to IRS was 35 percent faster than that which Kalvar had tested. Considering that the Kalvar specification film did not meet IRS's requirement and that Mikrolith 200 and HS-66 would meet IRS's requirement, GSA determined that IRS's need for film could only be satisfied by film with a speed rating which exceeded the specification range.

We recognized that Kalvar would be entitled to damages if it could be shown that an agency purchased the Xidex film during the term of Kalvar's primary source FSS contract when the film listed on Kalvar's FSS contract was adequate to meet the agency's requirements. However we concluded that the record did not support a finding that IRS's purchase of HS-66 film constituted a breach of the primary source contract.

In its request for reconsideration, Kalvar contends that it could have met IRS's needs during fiscal year 1973 with specification film, if only GSA had given it the opportunity to do so. In support of this contention Kalvar notes that its contract film could have been increased in speed by 50 percent and still have been within the specification for its primary source contract. This is possible, Kalvar claims, because its contract film had a speed rating of 1.20 to 1.30 while the specification prescribed an acceptable "range" of 1.05 to 1.45 for that class of film. Kalvar further states

that in fiscal year 1974 it supplied film to IRS, although under a different specification, and there were no complaints concerning this film. Yet, Kalvar claims, when the 1974 film is measured in accordance with the 1973 specification, it has a speed rating of 1.36 to 1.45.

Kalvar urges that under its primary source contract the Government had an obligation to provide Kalvar with an opportunity to meet IRS's needs prior to instituting the multiple-award FSS. Indeed, Kalvar argues that any other interpretation of its primary source contract would be unreasonable and would undermine the integrity of the primary source concept by denying the primary source contractor a chance to meet the Government's requirements with specification film.

We do not agree with Kalvar's interpretation of its contract. Under Section 3.2.7 of the contract specification, Kalvar was required to furnish film with a speed rating of "1.25 ± 0.20." None of the parties has suggested that under Section 3.2.7 a contractor was required to furnish a film which spanned the entire range of speed from 1.05 to 1.45. Similarly we do not interpret 3.2.7 as requiring a contractor to furnish a number of films in order to cover the entire range. Rather, we read this specification as imposing a requirement for film having a speed rating of 1.25 with a permissible tolerance of ± 0.20. In our opinion a contractor furnishing film with a rating of 1.20 to 1.30 would meet the specification requirement, and the Government could not require such a contractor to furnish "faster" film in order to meet a special need of a user agency. In the absence of a right on the part of the Government to require the contractor to furnish "faster" film, the Government would have no obligation to order "faster" film from the primary source contractor, consistent with the legal doctrine of mutuality of obligation. See generally *3 Williston, Contracts* § 105A.

Concerning the integrity of the primary source concept, we note that the primary source contractor was free to select a film within the limits permitted by the specification which the contractor felt could best serve the needs of the using agencies. Apparently Kalvar's choice of film was sufficiently responsive to the individual needs of the various agencies so that only one using agency was unable to use the film provided. As recognized in our prior decision, the Government would be liable for damages to Kalvar if it were shown that an agency purchased film listed on the multiple-award schedule, when the film furnished under Kalvar's primary source contract would have met that agency's needs. Under the circumstances we do not believe that the primary source concept was undermined by GSA's actions in this case.

Accordingly, the decision of March 29, 1974, is affirmed.

/s/ Robert F. Keller
Deputy Comptroller General
of the United States

APPENDIX E

Text of 28 U.S.C. § 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority.

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

APPENDIX F

Text of 40 U.S.C. § 481(a)

§ 481. Procurement, warehousing, and related activities.

(a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—

(1) prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, property identification and classification, transportation and traffic management of public utility services, and repairing and converting; and

(2) operate, and, after consultation with the executive agencies affected, consolidate, take over, or arrange for the operation by any executive agency of warehouses, supply centers, repair shops, fuel yards, and other similar facilities; and

(3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply such as those mentioned above in subparagraph (1) of this subsection: *Provided,* That contracts for public utility services may be made for periods not exceeding ten years; and

(4) With respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies;

Provided, That the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administrator under clauses (1)-(4) of this subsection whenever he determines such exemption to be in the best interests of national security.

APPENDIX G

Federal Property Management Regulations
Code of Federal Regulations, Title 41, Chapter 101

Part 101-26—Procurement Sources and Programs
Subpart 101-26.1—General

§ 101-26.100-1 Procurement of lowest cost items.

GSA provides under both its supply distribution system and the Federal Supply Schedule program, lines of similar items to meet particular end-use requirements. Although these similar items may differ in terms of price, quality, and essential characteristics, they can often serve the same functional end-use procurement needs of the various ordering agencies. Therefore, in submitting requisitions or purchase orders for an item obtainable from both GSA stock and Federal Supply Schedule contracts, agencies shall utilize the source from which the lowest cost item can be obtained which will adequately serve the functional end-use purpose.

§ 101-26.100-2 Request for waivers.

When an agency required to use GSA stock or Federal Supply Schedule items determines that such items will not serve the required functional end-use purpose of the item proposed to be procured, requests to waive the requirement for use of GSA sources shall be submitted to GSA for consideration. (Personal preference and subjective evaluations are not acceptable as sufficient justification for a waiver.) However, a waiver is not required where a desired similar item will be procured at a lower cost from another GSA source in accordance with the policy set forth in § 101.26.100-1 relating to the acquisition of the lowest cost item from GSA sources.

(a) Requests for waivers shall be submitted to the Commissioner, Federal Supply Service, General Services Administration, Washington, D.C. 20406, and, if considered justified, will be approved. If disapproved, the requesting office shall be so notified. Such requests shall contain:

(1) Complete description of the item requested. (Descriptive literature such as cuts, illustrations, drawings, and brochures which show the characteristics or construction of the item or explain its operation should be furnished wherever possible in satisfaction of this requirement.)

(2) Comparison of price and pertinent technical differences between the item requested and the GSA item:

(i) Inadequacies of the GSA item in performing required functions.

(ii) Advantages of the item requested, such as technical, economic, or other.

(3) Quantity required. (If demand is recurrent (estimate annual usage), nonrecurrent, or unpredictable, so state.)

(4) Other pertinent dates when applicable.

(b) Agencies shall not initiate action to procure similar items from non-GSA sources until a request for a waiver has been requested from and approved by GSA. The fact that action to procure a similar item has been initiated will not influence GSA action on a request for waiver.

Subpart 101-26.4—Purchase of Items From Federal Supply Schedule Contracts

§ 101-26.401 Applicability.

All executive agencies shall procure needed articles and services from Federal Supply Schedule contracts in accord-

ance with the provisions of the appropriate Federal Supply Schedule.

(a) The general principles and methods prescribed in this Subpart 101-26.4 apply to all such procurement. Consequently, prior to initiating procurement directly from commercial sources, agency activities shall determine whether the required item or a similar item serving the required functional purpose is available from a Federal Supply Schedule.

(b) The Guide to Sources of Supply and Service (see § 101-26.402-4), issued by the Commissioner, Federal Supply Service, GSA, is a ready reference for information on the availability of items from a Federal Supply Schedule.

§ 101-26.401-1 Mandatory use of schedules.

Federal Supply Schedules are mandatory to the extent specified in each schedule. The Guide to Sources of Supply and Service provides summary information as to mandatory coverage of each schedule. In event of any apparent conflict, the provisions of the schedule are governing. Newly developed schedules and some other schedules may be mandatory to only one or a small number of agencies. One schedule is entirely optional, and is the only exception to mandatory coverage; it is the schedule covering Motor Vehicle Parts and Accessories (FSC Groups 25, 28, 29, 38, and 39).

§ 101-26.401-2 Primary source of supply concept.

Schedules issued prior to fiscal year 1963 list the agencies subject to mandatory use provisions under the caption "Mandatory Use." That caption is being progressively omitted as new Schedules are issued. Each such Schedule contains a "Scope of Contract" statement identifying specific agencies in designated geographic areas required to use the established contracts as "primary

sources of supply." Agencies so identified will, except as provided in § 101-26.401-4, use the Schedule on a mandatory basis and the established contracts will be primary sources of supply for the items involved.

§ 101-26.401-3 Similar items.

(a) Agencies required to use Federal Supply Schedule contracts shall obtain needed items from this source in lieu of procuring similar items from other sources when the Federal Supply Schedule item will adequately serve the required functional end-use purpose. This is not applicable where procurement (1) does not exceed the amount set forth in the "Small Requirements" provision, (2) is to be effected under the "Urgent Requirements" provision, or (3) is for delivery outside the geographical area specified in the scope of contract provision.

(b) When an agency determines that items available from Federal Supply Schedule contracts will not serve the required functional end-use purpose of the item proposed to be procured, a request to waive the requirement to use this source shall be submitted to GSA for consideration in accordance with the provision of § 101-26.100-2.

§ 101-26.401-4 Exceptions to mandatory use.

(a) *Delivery Requirements.* (1) When the delivery period offered in the Federal Supply Schedule does not meet the delivery requirements of the purchasing activity, use of the Federal Supply Schedule is not mandatory. However, delivery dates shown in Federal Supply Schedules are based upon the average capability of the contractor and are usually conservative. Contractors, in most instances, are able to make delivery within a shorter period of time than the maximum provided in the Schedule. Therefore, when the delivery requirements of the purchasing activity are less than the maximum shown in the Schedule, the contractor should be queried as to whether

the delivery requirements can be met. This procedure shall be followed except in those cases where transportation time from the contractor's shipping point or time required for inquiry and reply makes conformance impracticable.

(2) Most Federal Supply Schedule contracts include a provision requiring contractors to reply to agency requests for earlier delivery within three working days, such replies to be made by the same method of communication used by the ordering agency. This contract provision also provides that earlier deliveries offered by contractors and accepted by ordering agencies will be binding on the contractors. Failure to meet maximum Federal Supply Schedule delivery dates (or dates for faster delivery as agreed to by contractors under contracts containing the above-mentioned provision) will constitute a breach of contract and will be treated in accordance with § 101-26.403.

(3) In applying the procedure covered in § 101-26.401-4(a)(1) where contracts do not include the provision referred to in § 101-26.401-4(a)(2) (generally those contracts entered into prior to fiscal year 1963) and the contractor has affirmed his inability to provide earlier delivery, procurement from other sources for delivery within earlier periods than the maximum specified in the Schedule may be made under the "Emergency and Special Requirements" provision of the Schedule. In such cases, an appropriate record justifying the action should be retained.

(b) *Small requirements.* Federal Supply Schedules stipulate dollar amounts or quantitative values below which agencies are not obligated to submit orders and contractors are not obligated to accept orders. In determining applicability of this exception, all requirements which would normally be included in a single order to a contractor must be considered.

(c) *Abnormal requirements.* Federal Supply Schedules stipulate maximum dollar limitations above which agencies may not submit orders and contractors may not accept orders. The maximum limitation varies between Schedules. The value of a single purchase order, or a series of orders placed within a short time, may not exceed this maximum. Each Schedule also contains instructions with respect to methods of procuring abnormal requirements from sources other than the Federal Supply Schedule contract involved.

(d) *Legislative and judicial agencies.* Except as may be provided by law or by authorized agreement with responsive officials of any agency in the legislative or judicial branches of the Federal Government, no Federal Supply Schedule will include any such agency as subject to its mandatory use provisions.

(e) *Geographic location.* Federal Supply Schedules delineate geographic coverage on a national, zone, regional, or other area basis. In determining exceptions on this basis, the location of the activity to which delivery of the articles will be made or the location at which service will be performed governs, and not the location of the agency office which places the order with the contractor.

Part 101-29—Federal Specifications and Standards
Subpart 101-29.2—Specifications

§ 101-29.203 Mandatory use of Federal Specifications.

Federal Specifications shall be used by all Federal agencies, in the procurement of supplies and services covered by such specifications, except as provided in §§ 101-29.204 and 101-29.205.

§ 101-29.204 Exceptions to mandatory use of Federal Specifications.

(a) Federal Specifications need not be used under any of the following circumstances:

(1) The purchase is required under a public exigency and a delay in obtaining agency requirements would be involved in using the applicable specification.

(2) The total amount of the purchase does not exceed $2,500. Multiple small purchases of the same item shall not be made for the purpose of avoiding the intent of this exception. Further, this exception in no way affects the requirements for the procurement of items available from GSA supply distribution facilities, Federal Supply Schedule contracts, GSA procurement programs, and certain procurement sources, other than GSA, which have been assigned supply responsibility for Federal agencies, as provided in Subparts 101-26.3, 101-26.4, 101-26.5, and 101-26.6.

(3) The items are purchased in foreign markets for use of overseas activities of agencies.

(4) An Interim Federal Specification is used by an agency in lieu of the Federal Specification.

(5) Where otherwise authorized by law.

(b) If the purchase involves the following, Federal Specifications need not be used except to the extent that they are applicable, in whole or in part:

(1) Items required in construction of facilities for new processes or new installations of equipment;

(2) Items required for experiment, test, or research and development; or

(3) Spare parts, components, or materials required for operation, repair, or maintenance of existing equipment.

§ 101-29.205 Deviations from Federal Specifications.

When the essential needs of an agency are not adequately covered by an existing Federal Specification, and the proposed purchase does not come within the excep-

tions described in § 101-29.204, the agency may authorize deviations from the Federal Specification. However, requirements of existing Federal Specifications shall be used to the maximum extent practicable.

APPENDIX H

Federal Procurement Regulations
Code of Federal Regulations, Title 41, Chapter 1

Part 1-1 General

Subpart 1-1.3—General Policies

Section 1-1.305—Specifications

§ 1-1.305-1 Mandatory use of Federal Specifications.

Federal Specifications shall be used by all executive agencies, including the Department of Defense, in the procurement of supplies and services covered by such specifications, except as provided in §§ 1-1.305-2 and 1-1.305-3.

§ 1-1.305-2 Exceptions to mandatory use of Federal Specifications.

Federal Specifications need not be used under the following circumstances:

(a) The purchase is required under a public exigency and a delay would be involved in using the applicable specification to obtain agency requirements.

(b) The total amount of the purchase does not exceed $2,500. (Multiple small purchases of the same item shall not be made for the purpose of avoiding the intent of this exception.)

(c) The purchase involves items of construction for new processes, new installations of equipment, or items for experiment, test, or research and development, until such time as specifications covering them are issued or it is determined by the General Services Administration, and the procuring agencies notified, that further deviations from the Federal Specifications will not be permitted:

Provided, That, in connection with such deviations, existing Federal Specifications shall be used to the extent that they are applicable.

(d) The purchase involves spare parts, components, or materials required for repair or maintenance of existing equipment, or for similar items required for maintenance or operating of existing facilities or installations: *Provided,* That existing Federal Specifications shall be used to the extent that they are applicable.

(e) The items are purchased in foreign markets for use of overseas activities of agencies.

(f) An Interim Federal Specification is used by an agency in lieu of the Federal Specification.

(g) Where otherwise authorized by law.

§ 1-1.305-3 Deviations from Federal Specifications.

When the essential needs of an agency are not adequately covered by an existing Federal Specification, and the proposed purchase does not come within the exceptions described in § 1-1.305-2, the agency may authorize deviations from the Federal Specification; provided, that:

(a) Requirements of existing Federal Specifications shall be used to the maximum extent practicable.

(b) Each agency taking such deviations shall establish procedures whereby a designated official having substantial procurement responsibility shall be responsible for assuring that:

(1) Federal Specifications are used, and provisions for exceptions and deviations are complied with;

(2) Justifications for exceptions and deviations are subject to competent review before authorization, and that such justifications can be fully substantiated if post audit is required;

(3) Major or repeated deviations are not taken except as prescribed in this § 1-1.305-3; and

(4) Notification or recommendation for change in the specification is sent promptly to the General Services Administration by the designated official or subdivision at the agency level, through established agency channels, when—

(i) Deviations taken are of a major nature as to result in the entrance of a new item into the supply system of the agency as evidenced by the development of a new item identification; or

(ii) A deviation is taken repeatedly.

(5) Notification or recommendation for change in the specification shall be submitted, in duplicate, to the General Services Administration, Federal Supply Service, Washington, D.C. 20405. It shall include a statement of the deviations authorized by the agency, with justification therefor, and, where applicable, recommendation for revision or amendment of the specification.

(c) Deviations taken and reported by the agency in accordance with § 1-1.305-3(b) may not be continued except under the following conditions:

(1) Upon notification by an agency that major or re peated deviations have been taken and where no recommendation for change in the specification is made by the agency, the General Services Administration will notify the agency as to whether such deviations may be continued in subsequent procurement. In cases where deviations are not approved and where procurement by the agency has progressed to a point where it would be impracticable to amend or cancel the action, such action may be completed, but the deviation shall not be authorized by the agency in subsequent procurement.

(2) Where an agency has recommended changing the specification consistent with the deviations it has taken and reported, those deviations may be continued until such time as the recommended change is coordinated and incorporated in the specification; provided, that where coordination with Federal agencies and industry, as applicable, does not result in acceptance of the change, such deviations shall not be authorized by the agency in subsequent procurement.

Part 1-8 Termination of Contracts

Subpart 1-8-2 General Principles Applicable to the Termination for Convenience and Settlement of Fixed-Price Type and Cost-Reimbursement Type Contracts

§ 1-8.202 Notice of termination

(a) Contracts shall be terminated for convenience only by a written notice to the contractor (see § 1-8.801 for suggested formats of notices of termination for convenience), stating:

(1) That the contract is being terminated for the convenience of the Government (citing the appropriate contract clause, if any, authorizing such termination);

(2) The effective date of termination;

(3) The extent of termination and, if a partial termination, the portion of the contract to be continued; and

(4) Any special instructions.

(b) A copy of the notice of termination shall be sent to each known assignee, guarantor, or surety of the contractor.

Subpart 1-8.3—Additional Principles Applicable to the Settlement of Fixed-Price Type Contracts Terminated for Convenience

§ 1-8.301 General.

(a) A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including an allowance for profit thereon which is reasonable under the circumstances. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The application of standards of business judgment, as distinguished from strict accounting principles, is the heart of a settlement.

(b) The primary objective is to negotiate a settlement by agreement. The parties may agree upon a total amount to be paid the contractor without agreeing on or segregating the particular elements of costs or profit comprising this amount.

(c) Cost and accounting data may provide guides, but are not rigid measures, for ascertaining fair compensation. In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of recordkeeping, reporting, and accounting, in connection with the settlement of termination claims, shall be kept to the minimum compatible with the reasonable protection of the public interest.

APPENDIX I

Excerpt of "Scope of Contract" Provision in Petitioner's Primary Source of Supply Contract with Federal Supply Service

(a) This invitation provides for the normal supply requirements of all departments and independent establishments, including wholly-owned Government corporations, in the executive branch of the Federal Government (except the Department of Defense and the U.S. Postal Service) and the Government of the District of Columbia for delivery within the 48 contiguous States and Washington, DC, and resultant contracts will be used as primary sources for the articles or services listed herein. Articles or services will be ordered from time to time in such quantities as may be needed to fill any requirement determined in accordance with currently applicable procurement and supply procedures. As it is impossible to determine the precise quantities of different kinds of articles and services described in the invitation that will be needed during the contract term, each contractor whose bid is accepted will be obligated to deliver all articles and services of the kinds contracted for that may be ordered during the contract term, Except:

(1) Small Requirements. . . .

(2) Maximum Order Limitation. . . .

(3) Urgent Requirements. . . .

APPENDIX J

"Special Requirements" Provision in Petitioner's Primary Source of Supply Contract with Federal Supply Service

Where an agency required under (a) of the Scope of Contract provision, to use the contracts listed herein, finds that the specific articles or services contracted for will not meet a special requirement, articles or services having the same general characteristics needed to meet the special requirement may be procured: provided, that a prior written waiver of the requirement for using this Schedule is obtained from the General Services Administration. Requests for such waivers shall be submitted to the Commissioner, Federal Supply Service, General Services Administration, Washington, DC 20406, in accordance with Section 101-26.401-3 of the Federal Property Management Regulations and any implementing regulations of the requesting agency.